STATE OF MICHIGAN

COURT OF APPEALS

DEONTAE GORDON, Plaintiff-Appellant,	UNPUBLISHED April 1, 2014
v	No. 313429 Ingham Circuit Court
BRENDA GOODMAN, Defendant-Appellee.	LC No. 12-000164-NZ

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and (C)(8) on the grounds of governmental immunity for employees. Plaintiff is a prisoner in the custody of the Michigan Department of Corrections (MDOC). Defendant, a corrections officer at the facility where plaintiff was housed, stopped him and confiscated certain papers from him, then destroyed those papers. Plaintiff contends that the papers were legal materials and photographs rather than contraband "gambling slips," and brought the instant suit for conversion and gross negligence. We conclude that the trial court erred in granting summary disposition on the basis of governmental immunity. However, because plaintiff failed to comply with the disclosure requirements of MCL 600.5507(2), we have no alternative but to affirm the dismissal on that ground, notwithstanding the trial court's error.

Regarding plaintiff's substantive claims, we consider the substance of a claim rather than the labels a party applies or the artfulness of the pleadings. *In re Bradley Estate*, 494 Mich 367, 387 n 49; 835 NW2d 545 (2013); see also *Latits v Phillips*, 298 Mich App 109, 120; 826 NW2d 190 (2012). It is clear from the substance of plaintiff's complaint that he alleges only the intentional tort of conversion, which is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). There is no suggestion that any of defendant's complained-of acts were negligent, reckless, or accidental. Consequently, MCL 691.1407(2), which the trial court applied, is inapplicable. Intentional-tort liability for individuals is based on the common law as it existed prior to the July 7, 1986 enactment of the governmental tort liability act, MCL 1691.1401 *et seq*. *Odom v Wayne Co*, 482 Mich 459, 472-476; 760 NW2d 217 (2008).

Because only an intentional tort is alleged, defendant would be entitled to individual governmental immunity if:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
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> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
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> (c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich at 480.]

It is indisputable that defendant undertook the complained-of acts during the course of her employment. "The good faith element is subjective in nature, and it protects a defendant's honest belief and conduct taken in good faith with the cloak of immunity." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). "Discretionary acts are those that require personal deliberation, resolution, and judgment." *Id*.

Significantly, the record shows a genuine question of fact whether the confiscated materials were genuinely contraband. DOC Policy Directive 04.07.112 ¶ E[1] specifically provides that a prisoner is authorized to possess personal photographs, and DOC Policy Directive 04.07.112 ¶ N specifically provides that a prisoner is authorized to possess legal documents. DOC Policy Directive 04.07.112 ¶¶ CC defines "contraband" as, *inter alia*, personal property not specifically authorized or in excess of allowable limits or impermissibly altered; it does *not* state that property possessed in an unauthorized location is "contraband" simply because of situational context.

If the confiscated materials were legal documents or personal photographs, they would clearly not be contraband per se, and even if they were not permitted in the prison yard, they would still not clearly be defined as "contraband" pursuant to any policy directive we can find. DOC Policy Directive 04.07.112 ¶ FF provides that "[p]roperty determined not to be contraband shall be returned to the prisoner" (underlining in original). Consequently, if the materials were in fact legal documents and personal photographs, defendant could not have acted and could not have reasonably believed that she was acting within the scope of her authority or in good faith in destroying them.[2] Additionally, a governmental employee acts outside the scope of his or her

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[1] Because we have not been provided with a complete copy of the policy directive as it existed in 2011, when the incident at issue took place, all of our references are to the current version of the policy directive as found on the Michigan Department of Corrections' website. The version of the policy directive to which we refer is dated December 1, 2013, and it appears that while the relevant paragraphs are substantively identical, they are no longer identically enumerated.

[2] DOC Policy Directive 04.07.112 ¶ EE provides, *inter alia*, that "an item believed to be contraband shall be confiscated." We presume that it may not be immediately obvious whether any particular item is contraband, e.g., whether a document is a "legal document," and so the

authority when he or she does not act in accordance with "established administrative guidelines, regulations and informal policy." See *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 633; 363 NW2d 641 (1984), superseded in part by MCL 691.1407. Thus, the defense of individual governmental immunity would fail. *Odom*, 482 Mich at 480.

Plaintiff argues that defendant also violated other policy directives. Plaintiff contends that under DOC Policy Directives 04.07.112 ¶¶ EE and FF, he was entitled to a Contraband Removal Record, as well as either a misconduct report or a Notice of Intent to Conduct an Administrative Hearing. Plaintiff further contends that if he was issued a Notice of Intent to Conduct an Administrative Hearing, then he was entitled to a hearing unless waived in writing. We note that presuming the correctness of plaintiff's assertions, they would only be relevant insofar as they cast light on whether defendant converted his property. Agency policies do not have the force of law unless they "fall under the definition of a properly promulgated rule." *Danse Corp v City of Madision Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). DOC policy directives *could* be promulgated rules, but those at issue here are not, so "no sanction attaches to [their] violation." *Boyd v Civil Serv Comm*, 220 Mich App 226, 236; 559 NW2d 342 (1996). Nonetheless, they do have bearing on whether defendant acted outside the scope of her authority and the extent to which she had any discretion in the matter.

DOC Policy Directive 04.07.112 ¶ EE unambiguously requires that a "prisoner shall be issued a Contraband Removal Record . . . and either a misconduct report . . . or a Notice of Intent to Conduct and Administrative hearing." It further provides that a hearing on either the report or the notice "shall" be conducted as set forth in other provisions. DOC Policy Directive 04.07.112 ¶ FF provides that unless the prisoner agrees otherwise, "a hearing shall be conducted . . . to determine if the property is contraband and, if so, the appropriate disposition of the property." The word "shall" indicates mandatory language. See *Whitman v Galien Twp*, 288 Mich App 672, 682; 808 NW2d 9 (2010). It is not disputed that plaintiff did not receive any of the above-referenced documents.

It appears by implication from DOC Policy Directive 04.07.112 ¶ FF's references to "the Notice" that a hearing under that paragraph is only required if a prisoner was issued a Notice of Intent to Conduct an Administrative hearing under ¶ EE. DOC Policy Directive 04.07.112 ¶ EE references DOC Policy Directive 03.03.105 regarding misconduct reports. DOC Policy Directive 03.03.105 ¶ C provides, in relevant part, that "[c]ounseling shall be attempted to correct minor violations. A Misconduct Report (CSJ-288) may be written, however, when rule infractions require more formal resolution." The word "may" indicates permissive language. See *Hackel v Macomb Co Comm*, 298 Mich App 311, 319; 826 NW2d 753 (2012). Read in isolation, DOC Policy Directive 03.03.105 ¶ C clearly gives employees like defendant discretion whether to write a misconduct report. DOC Policy Directive 04.07.112 ¶ EE equally clearly requires a prisoner who is the subject of a confiscation to be issued either a misconduct report or a Notice of Intent to Conduct an Administrative Hearing, but the existence of DOC Policy

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initial act of confiscation could well have been in good faith no matter of what the materials consisted. Because plaintiff complains of the destruction rather than the initial confiscation, we only note the possibility out of interest.

Directive 03.03.105 ¶ C at least provides a basis for defendant to believe that not issuing a misconduct report was a reasonable discretionary act within her authority.[3]

However, critically, DOC Policy Directive 04.07.112 ¶ EE requires that the prisoner be issued a Contraband Removal Record *irrespective* of whether the prisoner is also issued—or not—a misconduct report or a Notice of Intent to Conduct an Administrative Hearing. In other words, presuming defendant had the discretion to decide to employ counseling rather than either a misconduct report or a notice, defendant would *still* have been required to provide plaintiff with a Contraband Removal Record. Plaintiff asserted in his grievance, in the trial court, and in his brief on appeal that he never received a Contraband Removal Record. Defendant never disputed that assertion. Indeed, one of plaintiff's requests for admissions was that "you did not issue an [sic] 'Contraband Removal Record' to Plaintiff." Plaintiff served defendant with his request for admissions on or before June 7, 2012, and defendant did not respond until July 27, 2012, well after the 28-day period for doing so; consequently, those admissions are admitted by defendant. See *Johnson Family LP v White Pine Wireless, LLC*, 281 Mich App 364, 388; 761 NW2d 353 (2008); see also *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 61-62; 475 NW2d 418 (1991).

Nothing in the policy directives that we have found that have been cited to us suggests that a Contraband Removal Record is optional. Unlike the misconduct report, for which DOC Policy Directive 04.07.112 ¶ EE refers to a policy suggesting discretion, DOC Policy Directive 04.07.112 ¶ EE unambiguously states that a Contraband Removal Record is mandatory and not discretionary upon confiscation of an item believed to be contraband. Consequently, even if the items that defendant confiscated were indeed contraband, defendant was acting outside of her authority by failing to issue such a record.[4] See *Ross*, 420 Mich at 633.

Ultimately, it is highly relevant whether the materials that defendant confiscated actually were contraband. The simple fact is that plaintiff asserts that it was not contraband, and defendant asserts that it was contraband. The materials themselves have been destroyed. Consequently, this case is a pure credibility contest between two parties offering opposing statements of fact with little more than the words of themselves and their witnesses to resolve the conflict. It was therefore inherently impermissible to dispose of this case on summary disposition on the basis of governmental immunity. Rather, all other things being equal, the

[3] It is not clear whether, as the Department of Corrections asserted, the best way to harmonize these two policy provisions is to conclude that DOC Policy Directive 03.03.105 ¶ C's apparent grant of discretion is superior to DOC Policy Directive 04.07.112 ¶ EE's apparent imposition of a limitation on discretion. We expect such a conclusion is reasonable and permits corrections officers to avoid wasteful administrative efforts in response to trivialities. However, we need not resolve any such ambiguity; we note only that the existence of the former provision provides defendant with a reasonable basis for holding a good-faith belief that she undertook a discretionary act within her authority.

[4] Although as discussed, a violation of this policy directive in the abstract is not sanctionable.

question of whether the confiscated materials were or were not contraband must be submitted to the trier of fact.

Unfortunately for plaintiff, we are nonetheless constrained to affirm the result reached by the trial court, albeit on entirely different grounds. Pursuant to the Prisoner Litigation Reform Act, MCL 600.5501 *et seq*., a prisoner bringing "a civil action . . . concerning prison conditions" is required to "disclose the number of civil actions and appeals that the prisoner has previously initiated." MCL 600.5507(2). If "[t]he prisoner fails to comply with the disclosure requirements of [MCL 600.5507(2)]," the court is required to dismiss the action "at any time." MCL 600.5507(3)(b). Because the Act contains a definition of what constitutes "a civil action concerning prison conditions," we are required to apply that definition. *W.S. Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 349-350; 91 NW2d 269 (1958). The definition here includes a suit for "damages or equitable relief arising with respect to . . . the effects of an act or omission of" government employees "in the performance of their duties." MCL 600.5531(a). An allegation of "intentional tortious behavior," as alleged here, falls within this definition. *Anderson v Myers*, 268 Mich App 713, 715-716; 709 NW2d 171 (2005).

We have found no document submitted to this Court or to the trial court in which plaintiff indicated the number of previous civil actions or appeals he has initiated. Under the Act, "[i]f a prisoner fails to disclose the number of previous suits, the statute explicitly instructs the court to dismiss the action." *Komejan v Dep't of Corrections*, 270 Mich App 398, 399; 715 NW2d 375 (2006). A plaintiff must disclose the number of previous suits even when that number is zero. *Id*. at 399-400. We note that defendant has not raised this issue. However, "the statutory language mandates dismissal of the appeal, without regard to how or when the issue was raised . . . regardless of when in the proceedings it is raised or, for that matter, whether it was raised by the appellee or by the Court on its own motion." *Tomzek v Dep't of Corrections*, 258 Mich App 222, 223, 225; 672 NW2d 511 (2003). Consequently, even though defendant failed to raise the issue, it is dispositive of this matter. Plaintiff's appeal must be dismissed.

Affirmed. In the interests of justice, because this potentially meritorious action is being dismissed for procedural reasons not argued by defendant, and because plaintiff is the prevailing party on the substantive issue actually raised, we direct pursuant to MCR 7.219(A) that neither party may tax costs.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause